No. 3755

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

J. W. WILLIS

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF MONTANA.

Brief of Defendant in Error

JOHN L. SLATTERY,
United States Attorney.
RONALD HIGGINS,
Asst. U. S. Attorney.
WELLINGTON H. MEIGS,
Asst. U. S. Attorney.
Attorneys for Defendant in Error.

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Brief of Defendant in Error

I.

Of the thirteen errors specified by the Plaintiff in Error, only two, in effect, are adverted to in the argument in his brief, and these relate to excerpts from the instructions given by the Court. No exception was taken to that part of the instructions in which the Court referred to the "sale of whisky at fifty cents a drink as being a profitable trade," (Trans. p. 127-8) (Ptf's. Brief 11) or to the Court's reference to the testimony or motive of Lizzie Drake,

a witness for the defendant. (Trans. p. 127-8) (Pts's. Brief. p. 11) Hence, under the familiar rule that alleged errors not excepted to will not be noticed on review, it is unnecessary to discuss the correctness or incorrectness of the Court's charge so far as those portions of it just referred to are concerned.

Two questions remain for argument:—first, Did the Court commit prejudicial error in giving to the jury that part of the instructions set forth in Specification of error No. V? (Ptf's. Brief, pp. 3, 4, & 5.)

Second, did the court commit prejudicial error in giving to the jury that part of its instructions set forth in Specification of Error No. VII? (Ptf's. Brief, p. 6.)

Before discussing these questions it is pertinent to observe that the plaintiff in error has singled out from a lengthy charge only two excerpts on which he predicates error. This manner of attacking the correctness of the instructions is not in accordance with the practice and decisions in federal courts. In the case of Charles v. United States, 213 Fed. 707 (C.C.A. 4th) it is said:

> "It is well settled that a single sentence or even a lengthy paragraph in a charge cannot be treated as determining the correctness of the charge in its entirety; the proper method being to consider the charge as a whole, and if, when so considered, it appears that the court has clearly stated the law, a reversal will not be directed, even though it should appear that some portion of the same is subject to criticism,"

And,

Detached portions of the instructions should be read in connection with the other portions.

May v United States, 157 Fed. 1, 6. (C.C.A. 9th.)

See also Horn v. United States, 182 Fed. 721, 740, (C.C.A. 8th), wherein it is said:

> "Excerpts from the charge standing by themselves and apart from the rest of it may be vulnerable to some of the criticisms urged against them; but that is not the proper test of the correctness of the charge. That must be considered as a whole. . . . . "

To the same effect are the following:

Colt v. United States, 190 Fed. 305, 308. (C.C. A. 8th).

LeMore et al v. United States, 253 Fed. 887. (C.C.A. 5th).

Peters v. United States, 94 Fed. 127; 36 C.C.A. 105.

II

Was it error for the Court to give that part of the instructions set forth in Specification of Error No. V? Technically, of course, no evidence was introduced by which it could be determined whether or not "no law ever written is being violated or has been violated to a greater degree than the Volstead Law is now," (and it is to be noted that the Court did not say that the Volstead Law "is being violated more than any other law now is," according to the exception taken by the defend-

ant's counsel). (Trans. p127-8). It is clear that all that the Court said in that respect amounted to nothing more or less than a comment on a fact which is commonly known, for it is notorious that the courts in the United States, police, State, and Federal are constantly called upon to exercise jurisdiction in cases arising from the alleged violation of the National Prohibition Act; and that the Court was simply making a general comment, as above suggested, must have been so understood by the jury, for the court, out of an abundance of caution, lest the jury might consider that comment as an intimation from the court that they should find the defendant guilty, further charged the jury:

> "Why do I say this to you? Not to say that this defendant is to be convicted; not at all. I merely wish to impress upon you the seriousness of your duty in every one of these cases as in any other question that may be brought before you, and that you give to it the same serious, thoughtful and honest consideration; that you execute and carry out your duty, your obligation and your oath, whatever the verdict may be." (Trans. p.111-112).

As a matter of fact, the evidence on behalf of the Government showed rather frequent violations of the Volstead Law on the part of the defendant himself. For instance, the witness Gordon testified that he purchased whisky of the defendant on the 10th, 11th, 12th, 14th, 16th, and 17th of March, 1921. (Trans. pp.54-55), and during that period other persons were served with drinks in the defendant's house

by the defendant. (Trans. pp. 54-5-6-7). This evidence, coupled with the facts in the common knowledge of all of us, rendered the comment entirely harmless.

Courts very properly have a wide latitude in commenting on the evidence and expressing opinions thereon. The rule is well laid down in the case of Starr v. United States, 153 U. S. 614, on which case the plaintiff in error mainly relies for a reversal of the judgment herein. In Starr v. United States, supra, the court in charging the jury misdirected them as to the law, and having become apparently highly indignant toward the defense, employed language which was so forceful and bitter that it could not have had any affect other than to arouse the passions and sympathy of the jury to the prejudice of the defendant. Such is not the case here. In the Starr case is found a very clear exposition of the law with respect to the province of the Court, as follows:

> "It is true that in the Federal Courts the rule that obtains is similar to that in the English Courts, and the presiding Judge may, if in his discretion he thinks proper, sum up the facts to the jury; *and if no rule of law is incorrectly stated*, and the matters of fact are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error."

Rucker v. Wheeler, 127 U. S. 85, 93. (32; 102, 105.)

Lovejoy v. United States, 128 U. S. 171, 173. (32; 389, 390.)

It is not asserted by the plaintiff in error that the Court incorrectly stated any rule of law or failed to ultimately submit all matters of fact to the determination of the Jury.

In Lovejoy v. United States, supra, Justice Gray said:

> "It is established by repeated decisions that a Court of the United States in submitting a case to the Jury may, at its discretion, express its opinion upon the facts and that such an opinion is not reviewable on error, so long as no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury, ... "

Cited with approval in Simmons v. United States, 142 U. S. 148.

Supporting the same rule are the following cases:

Dunbar v. United States, 156 U. S. 185.

Wiborg v. United States, 163 U. S. 632.

An examination of the instructions discloses that the Court was extremely careful to make it clear that the right and duty to determine the facts were peculiarly and exclusively within the province of the jury.

> ". . . . . but when it comes to the facts, and what the evidence proves, what witnesses you will believe, what weight you will give to the testimony, what logical inferences you will draw from the circumstances in the case—that is entirely for you to determine. Your responsibility begins there; you determine the facts for yourselves. The Court cannot tell you what the facts are, nor bind you

to its view of the facts as given by the witnesses who appear before you. Courts are privileged to comment upon the credibility of witnesses and upon the weight of the evidence, and upon what is proven and what is not proven, in the Court's judgment; but that is not in the hope to bind you, for it cannot, and the Court has no right to bind you by its comments; and when it is done, it is solely for the purpose and object of aiding you to reason the case out to a correct conclusion." (Trans. p. 108-9).

". . . . . your duty relates to the facts, and the Court's to the law. . . . . You are judges of the facts." (Trans. p. 109).

". . . . . You, the Jury, will weigh the evidence against him and the evidence for him to determine whether, in spite of the presumption of innocence, he is guilty as charged, beyond a reasonable doubt." (Trans. p. 113)

". . . . . and whether or not it is an ingenuous defense or a truthful one is entirely for the jury to determine." (Trans. p. 121).

". . . . . On occasion there will be men who will swear to anything for both plaintiff and defendant, and it is for you to determine which of them is telling the truth. That is what you are here for—to penetrate these evasions and contradictions and arrive at the truth, in order to execute the law, whether it is a verdict of guilty or acquittal which you find; because a verdict of acquittal executes the law just as much as a verdict of guilty." (Trans. p. 123).

". . . . . It is for you to review the facts and circumstances, to take the evidence and weigh it, and to determine where the truth lies, in your judgment, and to render a verdict accordingly. If your judgment is that the defendant is proven guilty after you have reviewed the evidence, beyond a

reasonable doubt, it is your duty to convict him; if, on the other hand, you believe that he is not guilty, it is your duty to acquit him."

(Trans. p. 127)

"I don't know whether you misapprehended my statement. Gentlemen of the jury, the Court has not told you that Smith was the agent of the defendant; that was not the intention of the Court. I say that it is an inference you may ask yourselves whether it is not proper to draw, in view of all the circumstances disclosed in the case." (Trans. p. 128)

Certainly, the jury could not but understand that theirs was the absolute right to determine what was proved and what was not proved by the evidence, irrespective of any comment of the Court, and that all of the facts were left for their determination, and thus, the instruction is clearly within the rule laid down in Lovejoy v. United States, supra, and Starr v. United States, supra, so frequently cited with approval, and is likewise within the limitations prescribed in the decision of Shea et al v. United States, 251 Fed. 440, 445, (CCA 6th), from which we quote.

"The trial court is alleged to have invaded the province of the jury, first, by instructing in effect that the so-called "turf exchange" was a sham and a fraud, the requested instruction that such alleged fact must be proved beyond a reasonable doubt not being in terms given; and, second, in that the charge as a whole was unduly argumentative in favor of the prosecution. The rule is well settled in the federal courts that the trial judge has the right to express his opinion upon the facts of the case and to advise the jury re-

garding their conclusions thereon, provided the jury is given to unequivocally understand that it is not bound by the judge's expressed opinion. Simmons v. United States, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; Allias v. United States, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91; Young v. Corrigan (C. C. A. 6) 210 Fed. 442, 127 C. C. A. 174. This general rule is subject to the limitation that his comments upon the facts should be 'judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment.' Rudd v. United States (C.C.A. 8) 173 Fed. 912, 914, 97 C. C. A. 462; Sandals v. United States, (C. C. A. 6) 213 Fed. 569, 576, 130 C. C. A. 149.

The important question is whether the Court went beyond a proper exercise of his functions. In discussing the evidence of the existence of the alleged scheme to defraud the trial judge used the language which we quote in the margin. (3) Plaintiffs in error specially criticise the portions we have italicized. Obviously, the criticized extract must be considered in connection, not only with its context, but with the entire charge. The Court had already told the jury that it was its business 'to decide the facts, regardless of what it may assume to be the impressions of the judge.' Several times afterwards the jury was expressly told that it was the sole judge of the facts, including these statements:

'If your opinion upon the questions upon which the Court has ventured an opinion, namely, that a scheme to defraud was in operation, which was substantially of the character charged in the indictment, and that the mails were misused to promote such a scheme, without reference to the identity of the parties interested, differs from that entertained by the Court, your duty is to ad-

here to your own opinion, and not allow that of the Court to have any influence whatever upon your conclusion.'

It is true that the Court did express his opinion that no reasonable man could question that the so-called turf exchange was a pretense and a sham. This proposition, under the evidence in the case, was not reasonably open to question. There was uncontradicted and competent testimony which could reasonably mean only that neither the telephone nor telegraph instruments connected anywhere. The only reasonable inference from the testimony was that the charts, racing forms, etc., were shams. In view of the Court's charge, taken as a whole, including the express instructions regarding the presumption of innocence and the necessity of proving the various elements of the charge beyond a reasonable doubt, we find no prejudicial error, if indeed, there is any, in the failure to give the request we have referred to. While the charge of the Court was argumentative, in the sense that it contained a considerable discussion of the testimony, which was applied to the various elements of the offense charged, we are not impressed that it was unduly so, or that it went beyond the limitations upon the trial judge's right of comment as previously expressed in this paragraph."

(3) The marginal quotation above referred to, is as follows:

"There is little chance for dispute here, in the Court's opinion, but that the paraphernalia employed to impress Hoblitzel with the thought that he was in touch with a real turf exchange, so called, where real wagers on the outcome of real horse races might be laid, were but the furniture of this swindle. The large amount of ap-

> parent money was but a simulation, the telegraph and telephone instruments were but shams, in that neither was a real instrument of communication; the announcements and posting of races were shams, the bookings were tricks. Anyone who devised this scheme produced just such a fraudulent device as the statute condemns."

It is contended by plaintiff in error that the portion of the charge quoted in specification of Error No. V, was "highly prejudicial for the reason that it was calculated to inspire the jury to bring in a verdict of guilty against the defendant in order that the Volstead Law should be upheld and without regard to the evidence against defendant," and that "it was further calculated to so incite the minds of the jury that they would be constrained to return a verdict of guilty so that it would not be imputed that the Volstead Law was unpopular with them, or any of them. (Ptf's Brief, p. 10.)

This contention is not supported by the decisions. Even if the Court had told the jury that he believed the defendant was guilty, it would not have been error provided, the ultimate determination of the facts was left to the jury.

In the case of Morse v. United States, 255 Fed. 681, (C. C. A. 4th), the District Judge expressed his opinion of the defendant's guilt in the following language:

> "You are the sole judges of the facts of the case, and should determine the same after due

consideration of all the evidence, in the light of attending circumstances, and the reasonable and fair inferences to be drawn from the testimony, and in so doing you should act upon your own independent judgment, uninfluenced by what others, including the Court, may think or say. But I would be derelict in my duty if I did not say to you that, from my standpoint and viewpoint, this testimony irresistibly and irrefutably points to the absolute guilt of these defendants."

And, the appellate Court, speaking through Woods, Circuit Judge, said:

"The opinion that the accused was guilty was strongly expressed, but the expression was accompanied by an equally strong statement that the jury should exercise their own independent judgment in coming to a verdict uninfluenced by the opinion of the judge. Since the ultimate conclusion was left to the jury, there was no error in the instruction. United States v. Philadelphia & Reading R. R. Co., 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138; Simmons v. United States, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; Doyle v. Union Pacific Ry. Co., 147 U. S. 413-430, 13. Sup. Ct. 333, 37 L. Ed. 223; Allias v. United States, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91.

Breeze v. United States, 108 Fed. 804, 48 C. C. A. 36, relied on by defendant, seems to be inconsistent with the doctrine laid down by the Supreme Court in the cases cited. If that case can be sustained at all as a precedent, it is on the narrow distinction that the District Judge, although clearly charging the jury that they were not bound by his opinion, and should exercise their independent judgment, yet used the words, "that in his opinion it was the duty of the jury to convict the defendant." Here the jury were

not told that it was their duty to convict, or that they ought to convict."

In Endleman v. United States, 86 Fed. 456 (CCA 9th) the following extract from the opinion by Morrow, Circuit Judge, is pertinent:

"In charging the jury, the Court said:

'The federal courts allow the judges sometimes to give an opinion on the evidence. I gave my judgment to the other jury, and I will give it to you. I do not see any way that these defendants can be acquitted. Notwithstanding, I charge you that you are the judges of the evidence, and from that evidence, it is for you to say whether or not they, or either of them, are guilty.'

It is objected that the Court had no right to express an opinion as to the guilt or innocence of the defendant. The language used by the court, as to the guilt of the defendant, is certainly not to be commended. While it is true that the federal judges have the right, in criminal cases, to express to the jury their opinion as to the guilt or innocence of one accused of crime and on trial, and advise them as to the facts of the case, still the supreme court has repeatedly admonished the trial courts that this should be done with great care and circumspection.

In the case of Starr v. U. S., 153 U. S. 614, 627, 14 Sup. Ct. 919, 924, the supreme court, in expressing in unmistakable terms its disapprobation of the language used by the trial judge in his charge to the jury, said:

'Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same every-

where, and argumentative matter . . . . . should not be thrown into the scales by the judicial officer who holds them.'

While the remarks of the learned judge are subject to criticism, and we are compelled to express our disapproval of it, still as no rule of law was incorrectly stated to the jury, and the matters of fact were ultimately submitted to the determination of the jury, we do not consider that it was reversible error. Rucker v. Wheeler, 127 U. S. 85, 93, 8 Sup. Ct. 1142; Lovejoy v. U. S., 128 U. S. 171, 173, 9 Sup. Ct. 57.

The other errors assigned are so obviously without merit as not to require discussion. The judgment of the district court is affirmed."

Again, in Savage v. United States, 270 Fed. 14, (C.C.A. 8) the court told the jury that in its opinion the defendant was guilty on some of the counts of the indictment, and in the opinion the appellate court said:

"Complaint is made of a portion of the instructions expressing the Court's opinion as to the guilt of the defendant founded upon a general exception to 'the remarks of the court concerning the guilt or innocence of the defendant.' The court said that, as to four transactions which were named and described, there could not be any doubt that a fraud was perpetrated, but left it to the jury to find who had perpetrated the frauds. The court further said that it was of the opinion that the defendant was guilty on all counts but 4 and refused to express an opinion as to the defendant's guilt as to those 4. The court stated repeatedly that this was a mere expression of its opinion, and that the jury were not bound by it, and that it was the jury's duty to follow its own judgment, and that, if the jury

were of a contrary opinion, it was its duty to disregard the court's opinion. In the courts of the United States the judge may state to the jury his opinion upon the evidence, provided they are left free to determine the facts. Allias v. United States, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91; Horning v. District of Columbia (decided Nov. 22, 1920), 254 U. S. 135, 41 Sup. Ct. 53, 65 L. Ed.——; Aerheart v. St. Louis, I. M. & S. Ry. Co., 99 Fed. 907, 909, 40 C. C. A. 171; Smith v. United States, 157 Fed. 721, 732, 85 C. C. A. 353; Keller v. United States, 168 Fed. 697, 698, 94. C. C. A. 368."

III

Did the Court commit error in giving to the jury that part of the instructions set forth in Specification of Error No. VII? This question is practically disposed of by what is said with respect to Specification of Error No. V.

The assignment ought not to be noticed because the language of the Court does not support the exception, for the exception was "to that portion of your charge wherein you comment upon the fact and mention the fact that Vic Smith was the agent of the defendant, because I do not believe the same was warranted or justified by the evidence," (trans. p.128). What the Court did say to the jury was that they should ask themselves whether or not Smith was an agent of the defendant. (Trans. p.121) There is a vast difference between what counsel says the Court said and what the Court actually did say; the difference between the positive assertion of a fact and a direc-

tion to inquire as to whether or not such a fact existed.

In the case of Sylvia v. United States, 264 Fed. 59, (C. C. A. 6) the defendant was convicted for carrying on the business of a retail liquor dealer without having paid the tax required by law. Exceptions were saved to the instructions of the Court and the following language, taken from the decision is clearly in point.

> "In discussing certain features of the evidence pro and con, the court said:
>
> 'The point is, Was he furnishing whisky and taking money for it under such circumstances that you believe he was carrying on the business of furnishing whisky to those people who called him?'
>
> And again, following comments on the testimony of the telephone girl at the Gayoso Hotel regarding telephone calls and the results thereof, including defendant's appearance with three quarts of whisky (presumably just before the arrest), the court said:
>
> 'Was that a matter of accommodating a friend, or was that conduct more in keeping with a man doing the business of selling whisky?'
>
> In our opinion the charge, taken as a whole, does not contain reversible error.
>
> (7) As to the invasion of the province of the jury: A trial judge in the federal court has an undoubted right to state to the jury his opinion upon the facts, provided he does so judicially and fairly and ultimately leaves to the jury the decision of questions of fact. Young v. Corrigan

(C. C. A. 6) 210 Fed. 442, 127 C. C. A. 174, and cases there cited. And we cannot say that in this case the trial judge went beyond the limits of fair comment, especially if, as is presumably the case, defendant took on the trial the legal position recently stated above. The question of fact in this case was quite largely narrowed down, under the evidence, to whether what defendant did was by way of accommodation or whether he was actually carrying on business. On consideration of the entire case, we are not impressed that prejudicial error was committed by the trial judge or that defendant has failed to receive a fair trial.

The judgment of the District Court is accordingly affirmed."

The case of George D. Horning, Petitioner, v. District of Columbia, decided by the Supreme Court of the United States, on November 22, 1920, being case No. 77, October term, 1920, (opinion in pamphlet form) illustrates the extent to which the trial court may legitimately express its opinion both as to the facts and the guilt or innocence of the defendant. In that case the lower court said in its charge to the jury:

"In conclusion, I will say that a failure to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and of the law as I have given it to you and a violation of your obligation as jurors. Of course, gentlemen, I cannot tell you in so many words to find defendant guilty, but what I say amounts to that."

The petitioner excepted to the charge of the Judge

and by a majority decision, the judgment of conviction was affirmed.

It is respectfully submitted that in charging the jury in this case the Court

(1) Instructed them correctly as to the law;

(2) Instructed them that they were the sole judges of the facts proved or disproved; and,

(3) Instructed them calmly and dispassionately.

The judgment should be affirmed.

John L. Leaming

Ronald Higgins

Willington H. Meigs

Attorneys for Defendant in Error.